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No. 836

IN THE

Supreme Court of the United States

October Term, 1961

W. M. C. A., INC., R. PETER STRAUS, JOSEPH DE MAIO, EDWARD LIND, S. THOMAS DELANEY, EDWARD C. BROWN, JAMES J. McCAFFERTY,
Appellants,

v.

CAROLINE K. SIMON, Secretary of State of the State of New York, LOUIS J. LEFKOWITZ, Attorney General of the State of New York, ABE STARK, President of the City Council of the City of New York, EUGENE H. NICKERSON, Chairman, Board of Supervisors, Nassau County, OWEN M. QUINN, Chairman, Board of Supervisors, Westchester County, WILLIAM J. LEONARD, Chairman, Board of Supervisors, Suffolk County, DENIS J. MAHON, JAMES POWER, JOHN R. CREWS, THOMAS MALLEE, Commissioners, Board of Elections, New York City,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

MEMORANDUM

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MEMORANDUM

A. Holly Patterson, named appellee in the within proceeding, Chairman of the Board of Supervisors of the County of Nassau when so named, has been succeeded by election by Eugene H. Nickerson, now Chairman of the Board of Supervisors of the County of Nassau. The position taken by the former appellee in the lower court was in support of the conclusion reached by that court when it dismissed the complaint herein.

The purpose of this memorandum is to show respectfully to the Court the reasons why, after careful study

of applicable decisions, the present appellee, Eugene H. Nickerson, wishes to support appellants' position and request for jurisdiction of this Court in order that this matter may go to trial on the issues presented.

The Court's decision in *Baker* v. *Carr* (369 U. S. 186), on similar issues has held that similar facts involving state legislative apportionment, present a justiciable cause and when properly presented to an appropriate forum are entitled to determination and adjudication.

The complaint in this action proceeded upon the same jurisdictional basis as *Baker* v. *Carr* (*supra*), and the decision in the lower court in this case, holding the complaint failed to state a cause of action, was similar to the lower court's decision in *Baker* v. *Carr* (*supra*). It was rendered, of course, without benefit of this Court's decision in *Baker* v. *Carr* (*supra*). It is clearly contrary and unless the decision is set aside, will create confusion as to the importance of this Court's decision in *Baker* v. *Carr* (*supra*).

Here the lower court (16 Civ. 1559 at 276) determined that a distinction could be made between the Tennessee (*Baker*) case because of the right of the Tennessee voter for constitutional enforcement. A careful reading of the Supreme Court's decision in *Baker* v. *Carr* (*supra*), shows that this position has been disclaimed as a basis for finding whether or not a justiciable cause of action exists.

Whole areas of the most populated sections in the State of New York, particularly the urban and suburban territories, are stated to have been discriminated against by the New York State Constitution of 1894. While the passage of the Constitution by popular referendum may in circumstances constitute a defense to this action, it

does not furnish basis for the summary dismissal ordered by the lower court herein.

If the substantive position of the appellants is correct, it would appear there is no adequate political or electoral remedy for appellants nor, for that matter for the persons whom this appellee represents. Legislative malapportionment tends to frustrate the democratic process, and its abuses are self perpetuating and self generating. The case should be heard.

Judicial determination within the last twenty years has been an effective weapon in establishing equality of citizens under our laws.

In this major area of substantial and fundamental rights, by the very nature of the problem of state legislative malapportionment, the sole source of redress for deprivation of rights is by this appeal to this Court. Accordingly, Eugene H. Nickerson, Chairman, Board of Supervisors of Nassau County, joins the appellants in requesting jurisdiction by the Court and urges the necessity of a trial and full determination of the issues presented.

CONCLUSION

It is submitted that the Court has jurisdiction and should hear this appeal or, in its discretion, should reverse the decision below and remand this case for reconsideration in the light of *Baker* v. *Carr*.

Respectfully submitted,

BERTRAM HARNETT,
County Attorney of Nassau County,
Attorney for Appellee, Eugene H. Nickerson.

DOUGLAS P. NULL,
Senior Deputy County Attorney,
Of Counsel.

April 24, 1962.